

BLAND, C., 30th July, 1828.—This case standing ready for hearing, the solicitors of the parties were fully heard and the proceedings read and considered.

The object of this bill is not to repel a claim made by the executor of Walter Clagett against these plaintiffs: but to restrain the defendant, as administrator *de bonis non* of Samuel W. Clagett, from officiously making sale of that which had been the property of his testator, (but which had, long since, been legally delivered over to these plaintiffs to whom it had been bequeathed,) for the purpose of paying the claim, which Walter, by reason of his overpayment, as is alleged, had against the estate of his testator Samuel.

An executor who overpays is allowed, for such amount, to take the place of the creditor whose claim he has thus paid beyond the assets of his testator. He is, by substitution, regarded as one of the creditors of his testator: but such executor must establish the claim so overpaid against the heir or devisee by the same kind of testimony which might have been required of the original
532 *creditor himself. *Robinson v. Tonge*, 3 P. Will. 400; *Gist v. Cockey*, 7 H. & J. 139. (d) Had Walter Clagett, who thus became a creditor of Samuel W. Clagett, made this claim; the circumstance of his having delivered up the surplus, and the great length of time which had elapsed, from the delivery on the 9th of April, 1819, until the institution of this suit, without accounting for the unqualified manner of the delivery, and the delay, would have been considered as a complete bar. But in this case, the Statute of Limitations, as such, cannot properly be applied; be-

(d) EX PARTE STREET.—This petition was filed by John Street on the 3d of April, 1806, under the Act of 1785, ch. 72, s. 4, stating, that John Cook deceased had devised his land to be sold for the payment of his debts without authorizing any one to make the sale; that the personal estate of Cook had been exhausted; and that the petitioner, as his executor, had paid debts to a much greater amount than the assets which came to his hands. The real estate was accordingly decreed to be sold. After which the case having been brought before the Court for further directions, as to the distribution of the proceeds of sale among the creditors:

KILTY, C., 17th June, 1809.—The rule as stated by the auditor, of giving a priority to claims against the deceased to those which arise to the executor from an overpayment of the personal estate, was established by the late Chancellor. It has been departed from since, in cases where such overpayment was made on account of a judgment or other lien; even so far as to put the executor in the place of such creditor to the extent of his lien. In the present case the overpayment does not appear to have been made expressly on account of any such judgment; but inasmuch as there were claims on judgments paid by the executor exceeding the amount of the overpayment, and the other claims now exhibited are not entitled to any preference, it is thought proper to let the executor's claim come in equally with others.